IN THE

Supreme Court of the United States

GREAT LAKES DREDGE & DOCK COMPANY, Owner of Steamtug *John R. Williams*,
Petitioner,
against
UNITED STATES OF AMERICA, Owner of Submarine Cable 555,
Respondent.

October Term
1944
No. .....

BRIEF IN SUPPORT OF PETITION.

The facts involved, and the proceedings in the lower courts are set forth in the petition.

FIRST POINT.

HAVING FOUND THAT THE SUBJECT MATTER OF THE SUIT IS NOT WITHIN THE ADMIRALTY JURISDICTION, THE CIRCUIT COURT OF APPEALS SHOULD HAVE DIRECTED THE COMPLETE DISMISSAL OF THE ADMIRALTY PROCEEDINGS, AND ERRED IN AFFIRMING THE DECREE IN ADMIRALTY *in personam*.

The Government's allegation of the admiralty jurisdiction (R. 5) was challenged by the Great Lakes Company, (R. 8); and the suit proceeded to trial on that joinder of issue, the District Court holding that there was admiralty jurisdiction, and the Circuit Court of Appeals holding that there was not. No motion or suggestion was made by the Government in either Court that the proceedings be transferred to or commenced anew at common law.

There is no right to a trial by jury in admiralty and the Federal Rules of Civil Procedure do not apply in that Court. It is, therefore, difficult to understand how the Great Lakes Company waived the right to a trial by jury which it would have had at common law by failing to demand a right which did not exist in admiralty. The Government, in persisting in its efforts to establish the admiralty jurisdiction, did so at its peril, as would be true in any case in which the jurisdiction of the Court is challenged, *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 689; and the Great Lakes Company was under no compulsion to protect the Government against a subsequent denial of jurisdiction. When the Circuit Court of Appeals found that admiralty did not have jurisdiction, its affirmance of the admiralty decree *in personam* deprived the Great Lakes Company of the constitutional right to trial by jury which it would have had at law. On that point the decision below is in conflict with the law of the 4th Circuit, as stated in *Crouch* v. *United States,* 8 F. (2d) 435.

The decision of the Circuit Court of Appeals goes still deeper, to the question of the power of a court to decree and enforce a recovery of damages from a defending party when the court is without jurisdiction.

The jurisdictional limits of Courts of admiralty, equity and common law are distinct and separate even when those courts are sitting in the same geographical District. In *The Sarah,* 8 Wheat 391, Chief Justice Marshall, commenting on the separate jurisdiction of admiralty and common law, said, at 394:

> "Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law."

It was necessary for Congress to enact statutes to permit the transfer of actions from the common law side to the equity side of the Federal courts, to permit cross bills in equity and equitable claims and equitable defenses to be interposed in common law actions, and to permit the uniting of equity and law, Title 28 U. S. C. 1934 Ed. Secs. 397 and 398; Title 28 U. S. C. (1940 Ed.) Sec. 723(c). Congress has not enacted legislation to permit the transfer of admiralty proceedings to common law, or to combine admiralty suits with those of other jurisdiction, and the admiralty jurisdiction is still separate and distinct as it was when the case of *The Sarah* was decided. In *Aktieselskabet* v. *Lloyd*, 283 Fed. 62, subsequently approved by this Court in *Armour* v. *Ft. Morgan S. S. Co.* 270 U. S. 253, 259, it was held that a cause of action of non-maritime nature could not be joined with a suit in admiralty by an impleading petition.

Consequently, in the case at bar, when the Circuit Court of Appeals found that the suit was not within the jurisdiction of admiralty, it should have directed the complete dismissal of the admiralty proceedings and had no power to affirm the *in personam* portion of the admiralty decree upon some theory of an indirect and hybrid merger of admiralty and common law.

The Circuit Court of Appeals for the 9th Circuit in *Westfall etc.* v. *Allman-Hubble Tug Boat Co.* 73 F (2d) 200; *Nippon Yusen etc.* v. *Great Western Power Co.* 17 F (2d) 239, cert. denied 274 U. S. 745, and *Home Ins. Co.* v. *Merchants Transport Co.* 16 F (2d) 372, directed complete dismissal of the libels because of the lack of admiralty jurisdiction, even though the records in those cases indicate that the several libelants might have asserted their claims at common law in the same Districts.

Conversely, this Court in *U. S. Shipping Board* v. *Lustgarten,* 280 U. S. 320, and the Circuit Courts of Appeals for the 4th and 5th Circuits in *Waldo* v. *Wilson,* 231 Fed. 654 and *Sevin* v. *Inland Waterways Corp.* 88 F (2d) 988, directed the dismissal of complaints at law for lack of jurisdiction, upon finding that the claims should have been asserted in admiralty or in equity.

The practice adopted by the Circuit Court of Appeals for the Second Circuit in its earlier decisions cited in its opinion herein (R. 174) and applied to the case at bar, appears to rest upon a misconception of the decisions of this Court in statutory proceedings for seizures, forfeitures, and confiscations. Such proceedings are commenced by the filing of "libels of information", and although forms, modes, and terminology analogous to those used in admiralty, apply to such proceedings, admiralty jurisdiction with respect to them exists only when the seizures, etc., occur upon the navigable waters.

> "Such proceedings do not necessarily constitute a cause in admiralty. When instituted for condemnation of property on land, they have relation exclusively to matters which, in their nature, are not of admiralty cognizance." *Union Insurance Co.* v. *United States,* 73 U. S. 759, 764.

This Court has repeatedly held that when libels of information with respect to seizures etc., on land are improperly filed in admiralty the proceedings in admiralty must be dismissed in their entirety because of lack of jurisdiction. *The Sarah,* 8 Wheat, 391; *United States* v. *Hart,* 73 U. S. 770; *Union Ins. Co.* v. *United States,* 73 U. S. 759. In those cases the Court ruled that a party cannot be deprived of his right to a trial by jury at common law by

a proceeding in admiralty over which admiralty has no jurisdiction; and those decisions lend no support to the proposition that a decree in admiralty, although without jurisdiction, can be affirmed on the theory that the cause of action could have been asserted at law in the same district.

In the *Confiscation Cases*, 87 U. S. 92, this Court reached the conclusion that, in spite of terminology analogous to admiralty, the proceeding with respect to condemnations on land had been properly commenced and disposed of at law as a "common-law proceeding *in rem*," and, in approving the trial proceedings at common law without a jury, pointed out that that was due to the defendant's default and failure to traverse the facts alleged in the information. That decision lends no support to but conflicts with the ruling of the Circuit Court of Appeals in the case at bar.

SECOND POINT.

IF ANY RECOVERY IS DECREED TO THE GOVERNMENT IN ADMIRALTY ITS DAMAGES SHOULD NOT INCLUDE ITEMS OF EXPENSE WHICH IT WOULD HAVE INCURRED IN ANY EVENT IN OPERATING ITS REPAIR VESSEL.

In assessing damages, admiralty has long adhered to the rule of *restitutio in integrum*, limiting a recovery *in tort* to the actual pecuniary loss suffered. *The Baltimore*, 8 Wall 377, 385; *The Atlas*, 93 U. S. 302, 307; *The Cushing*, 292 Fed. 560, 566; *The F. J. Luckenbach*, 42 F(2d) 279, 280.

In the case at bar, the disputed items of the Government's claim were allowed by the Circuit Court of Appeals on the express theory that the Government would have incurred substantial expense if it had employed an inde-

pendent vessel to repair Cable No. 555, (R. 170-171) But the Government did not incur the expense of an independent vessel, and an allowance of the disputed items on the basis stated would seem to be contrary to the decision of this Court in *Brooklyn Eastern District Terminal* v. *United States,* 287 U. S. 170.

The District Court, confirming the Commissioner's report, asserted that Great Lakes Company was objecting to the disputed items on the ground that the repair work had been performed by the Government itself, (R. 155). The objection is not on that basis. The objection is that the expenses of operating the *Joseph Henry* would have been incurred by the Government even if there had been no damage to Cable No. 555 because of the payment of wages etc., upon an annual basis, and that therefore those expenses do not represent any pecuniary loss to the Government in connection with the damage to Cable No. 555.

The facts are similar to the case in which a vessel owner's marine superintendent devotes a substantial portion of his time to supervising collision repairs necessitated by the tortious act of another party. If the marine superintendent is on an annual salary, and if he supervises the owner's repairs without neglecting his other duties, no *pro rata* portion of his annual salary can be set up as part of the owner's damages. *The Itasca,* 117 Fed. 885, 888. A similar ruling by a Commissioner in *The Manhattan—The Bessemer* 1935 A. M. C. 227, 237, was confirmed in 10 F. Supp. 45.

THIRD POINT.

THE CIRCUIT COURT OF APPEALS ADOPTED TOO SEVERE A STANDARD, IN LAW, IN CONVICTING THE MASTER OF THE TUG OF NEGLIGENCE ON THE UNDISPUTED FACTS.

The standard on which the acts of a vessel's navigator should be judged is a question of law. *Ford Motor Co.* v. *Manhattan Lighterage Corp.* 97 F. (2d) 577; *B. & O. R. R.* v. *Goodman* 275 U. S. 66, 70; *Maloney* v. *Kaplan* 233 N. Y. 426, 430-431; *Standard Oil Co. of Kentucky* v. *Noakes,* 59 F. (2d) 897, 898.

In the case at bar, the Circuit Court of Appeals has approved findings of negligence by the District Court which conflict with the previously established standard that a person should not be chargeable in tort, with unforeseeable consequences of his acts. *Atchison Ry. Co.* v. *Calhoun,* 213 U. S. 1; *Ford Motor Co.* v. *Manhattan Lighterage Corp.,* 97 F. (2d) 577; *Western Union* v. *Schriver* 141 Fed. 538, 550; *Payne* v. *City of New York,* 277 N. Y. 393, 396.

The master of the tug *John R. Williams* could not have foreseen a physical impossibility,—i.e., that the round wire towing hawser could catch or cut the round lead-sheathed submarine cable; and when the towing hawser was found caught on some unknown heavy immovable obstruction, the master could not have foreseen that the strain of the tug's engine on the hawser would result in the cutting of the submarine cable by some sharp instrument whose presence he had no reason to suspect, and which was never found or identified by the Government.

The decision of the Court below, unless corrected, would result in liability for any submarine cable damage which is thought to have resulted from some act committed by a

vessel's navigator in a defined "cable area", no matter how indirect and unforeseeable that damage may have been, and even though no proofs are offered to show how the act resulted in the damage.

CONCLUSION.

The Petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. ERSKINE,
Counsel for Petitioner.

New York, N. Y.,
October 25th, 1944.